Supreme Court, U.S.
FILED

99549 SEP 28 1992

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No.

In the

Supreme Court of the United States

ALLRED'S PRODUCE,

Petitioner,

-versus-

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES C. GORDON, ESQUIRE
Counsel of Record
MARK W. ROMNEY, ESQUIRE
KELLY E. DEBERRY, ESQUIRE
Boswell & Kober, P.C.
500 Throckmorton
Suite 1800
Fort Worth, Texas 76102
(817) 878-4300

Curry & Taylor Appellate Service (202) 393-4141/rcurry8020@aol.com

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURT ERRED WITH REGARD TO THE SANCTION AWARDED?

II. WHETHER THE LOWER COURT ERRED WITH REGARD TO ITS FINDINGS AND CONCLUSIONS OF ITS FINAL ORDER THAT ALLRED'S FAILURE TO PAY WERE REPEATED AND FLAGRANT?

III, WHETHER ALLRED'S WAS SINGLED OUT FOR SELECTIVE ENFORCEMENT?

IV. WHETHER THE ALLOWANCE OF THE INTRODUCTION OF "NEW CLAIMS" AT THE AGENCY HEARING WAS IN EXCESS OF THE COURT'S AUTHORITY AND WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BYLAW?

V. WHETHER THE REVOCATION OF ALLRED'S LICENSE WAS WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BY LAW BECAUSE THE SECRETARY FAILED TO ESTABLISH A NECESSARY, STATUTORY PRE-CONDITION TO FILING A COMPLAINT FOR LICENSE REVOCATION, I.E., THAT A WRITTEN NOTIFICATION OF A VIOLATION OF THE PACA HAD BEEN RECEIVED PRIOR TO THE COMMENCEMENT OF THE INVESTIGATION THAT CULMINATED IN THE FILING OF THE COMPLAINT?

VI. WHETHER THE ALLOWANCE AND CONSIDERATION OF CERTAIN QUESTIONABLE AND UNRELIABLE EVIDENCE AND TESTIMONY PRESENTED BY THE USDA'S REPRESENTATIVE AT THE HEARING WAS WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BY LAW?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. 1a, and is reported at 178 F. 3d 743. The Decision and Order of William G. Jenson, Judicial Officer of the Secretary of Agriculture, is set forth in the Appendix, p. 11a, and is unreported. The Decision and Order of James W. Hunt, Administrative Law Judge, is set forth in the Appendix, p. 57a, and is unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit entered its judgment affirming the Secretary's decision to revoke Allred's PACA license on July 1, 1999. This Petition was timely filed within 90 days after entry of the judgment, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

7 USC Section 499b - text set forth in Appendix, p. 62a.

7 USC Section 499f - text set forth in Appendix, p. 64a.

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7 USC Section 499h(e) - text set forth in Appendix, p. 68a.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Fifth Circuit Court of Appeals which affirms a final order entered by the United States Department of Agriculture before the Secretary of Agriculture. The case was originally brought by the United States Department of Agriculture against Petitioner for alleged violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a - § 499s) (hereinafter referred to as "PACA").

On July 29, 1996, Respondent filed a complaint against Petitioner, alleging violations of PACA for Petitioner's failure to make full payment promptly to sellers as required by PACA. Petitioner filed a response and an amended response to the complaint in which Petitioner denied violating the PACA and asserted that a portion of the outstanding balance to vendors at issue had been paid.

On June 18, 1997, Administrative Law Judge James W. Hunt presided over a hearing which was concluded on August 8, 1997. At the conclusion of the hearing, the Administrative Law Judge concluded that Petitioner violated the PACA and revoked Petitioner's PACA license.

On September 5, 1997, Petitioner appealed to the Judicial Officer of the Secretary of Agriculture. On December 5, 1997, the Judicial Officer, William G. Jenson, without oral argument, adopted the initial decision and order of the Administrative Law Judge and made additional conclusions of the Judicial Officer.

On December 2, 1997, Petitioner timely filed a Petition for Reconsideration with the United States Department of Agriculture, which Petition was denied by order dated February 2, 1998. On April 2, 1998, Petitioner timely filed a Petition for Review. The Final Order which revokes Petitioner's PACA license, and from which Petitioner appeals, has been stayed pending the outcome of these proceedings by Order of the United States Department of Agriculture dated April 3, 1998.

The Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Said Court affirmed the Order of the Judicial Officer of the Secretary of Agriculture.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

1. UNDER THE ATTENDANT CIRCUMSTANCES AND THE CUSTOM AND PRACTICE IN THE INDUSTRY, THE LOWER COURT ERRED IN FAILING TO FIND THAT THE SANCTION AWARDED, LICENSE REVOCATION, WAS IRRATIONAL, INAPPROPRIATE, ARBITRARY AND CAPRICIOUS.

In his Bench Decision, Judge Hunt made it clear that but for the "firm and well-established" policy of the Secretary, i.e., "where the respondent is not in compliance at the time of the hearing the appropriate sanction is license revocation," he would have ruled in favor of Allred's. Unfortunately, Judge Hunt concluded he had no discretion under the Department's policy.

This policy, to which the Secretary adheres and to which Judge Hunt refers, appears to have been administratively created and adopted by the Secretary. *See, In re Gilardi Truck and Transportation, Inc.* 43 Agric. Dec. 118 (1984). As such, the policy can and should be judicially changed, particularly given the custom and practice in the industry.

In the industry, no supplier realistically expects to be paid accordingly to terms (whether they be those imposed under the regulations or otherwise) and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. What is important is the business relationship between the buyer and the seller. And, in the context of the industry, the prompt pay provision of the PACA, as currently enforced by the Secretary, does not reflect the real world.

The USDA-PACA Branch exists primarily at the behest of the industry. When the PACA was enacted over 30 years ago, it was at the request of the industry. The problem is that, over the life of the PACA, the Secretary has been caught in the web of the minutiae of statistical, objective enforcement. He and the representatives acting under his authority have forgotten the original purpose of the PACA - to serve the interests of the industry. Unfortunately, this mentality has effectively prevented a fair and just application of the enforcement provisions for many years and, in particular, with respect to Allred's in the present case.

At the hearing before the ALJ, the Secretary's representative testified that the Secretary requested revocation as a deterrent to other buyers against "prompt payment" violations and to avoid the risk of loss to produce suppliers. In this action, the sanction of revocation was arbitrary and capricious because it fails to recognize that the policy of the Secretary is not inflexible and fails to consider mitigating circumstances justifying a less drastic and destructive remedy (discussed at length below). Byron White, the former Regional Director for the Southwest Region of the USDA's PACA Branch in Arlington. Texas, and the only qualified expert on the subject to testily at trial, testified that putting Allred's out of business would not achieve any deterrent effect in the industry. Further, no supplier was complaining about Allred's failure to pay or seeking to put them out of business; therefore, no seller of produce can be found to have been at risk. Under these facts, it was inappropriate for Judge Hunt to revoke Allred's license when the purpose of the Secretary's policy would not be achieved.

Further, as Ms. Colson, the Secretary's representative testified, the Secretary's wholesale failure to consider outside factors (discussed below) as militating against the imposition of sanctions represents an abuse of the Secretary's discretion under 7 U.S.C. § 499h(a) which provides that he "may" impose sanctions and the flexibility imposed under recent amendments to the PACA allowing for monetary and other sanctions for violations of the PACA.

Further, a large number of produce suppliers are frequently in non-compliance with the "prompt pay" provision of the PACA on a daily basis. The Secretary chooses, for whatever reason, to ignore this fact. His imposition of sanctions against Allred's achieves absolutely none of the objectives he seeks to achieve.

Finally, and perhaps most importantly, the final order is in error and should be set aside because, although the Secretary articulated a rationale behind his policy justifying license revocation, i.e, deterrence of violative conduct and reducing the risk of loss to suppliers, he wholly failed to determine whether the purpose for the sanction would be achieved. At the Hearing, Ms. Colson (the Secretary's representative) testified that the Secretary conducted no analysis of the impact revocation of Allred's license would have on the industry - i.e., no analysis of the deterrent effect - and conducted no analysis of the impact license revocation would have on reducing the risk of loss to suppliers. How can the Secretary recommend imposition of a sanction as drastic as license revocation - which will effectively put Allred's out of business - when it never considered whether the purpose behind the sanction - deterrence and reduction of the risk of loss to suppliers - would be accomplished by such action?

Based on the foregoing and the discussion below, it is clear that the imposition of the sanction of license revocation was wholly inappropriate, unjustified, arbitrary and capricious.

In imposing his sanction of revocation, the ALJ and Judicial Officer failed to take into account the relevant factual and mitigating circumstances surrounding Allred's failures to pay suppliers according to terms, efforts which Allred's had undertaken to pay its suppliers, whether Allred's failure to pay affected the industry, whether imposition of a sanction of revocation would facilitate the regulatory purposes of the PACA, and the fact that not a single supplier of Allred's desired Allred's to be forced out of business (the logical consequence of license revocation), which is evidenced by the fact that no supplier is actively pursuing enforcement of payment obligations in an administrative or judicial proceeding.

While mitigating circumstances may not be entirely relevant in determining whether a person violated the PACA, consideration of mitigating circumstances is relevant with respect to the choice of sanctions. In this regard, *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991) the Secretary noted:

> It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, viz, that reliance will no longer be placed on the 'severe' sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451(9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all the relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

(*Id. at 497*). Accordingly, whether a remedy is appropriate "will depend on the pertinent statute and relevant facts." *Ferguson v. Department of Agriculture*, 911 F.2d 1273,1278 (8th Cir. 1990), *quoting, Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182,189, 93 S.Ct. 1455, 1459, 36 L.Ed.2d 142 (1973).

Further, in 1995, Congress amended the PACA to modernize and strengthen the operation of the PACA. The amendment also reflects the Secretary's current position, largely based on the reality of the practice within the produce industry, that license revocation and suspension, by themselves, are too draconian. On November 15,1995, the following provision of the PACA became effective:

> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by Section 499f of this title, that a commission

> merchant, dealer or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of the penalty under this subsection, the number of employees, and the seriousness, nature and amount of the violation . . . .

7 U.S.C. § 499h(e). This provision clearly gives the Secretary broader discretion to seek the imposition of less drastic sanctions upon consideration of all of the attendant circumstances and consequences which that decision will have on the buyer, supplier and industry.

In amending the PACA, Congress, acting in part on the Secretary's recommendation, was expressing its intention that the Secretary be permitted to consider alternative sanctions, such as monetary and probationary penalties. Given the changes to the PACA, Judge Hunt erred in failing to consider all facts and mitigating circumstances in imposing the sanction of revocation. While Judge Hunt may have considered that his hands were tied by the inflexibility of the Secretary's policy with respect to the appropriate sanction, this is not the case given the 1995 amendments to the PACA, circumstances of this action, and custom and practice in the industry.

Finally, § 499h(a) of the PACA provides that, assuming the Secretary determines that a violation of the PACA has occurred, the Secretary **may**, by order, revoke the license of the offender." (emphasis added). 7 U.S.C. § 499h(a). In this regard, the imposition of the sanction of revocation is not mandatory, but discretionary.

In the present case, the following facts demonstrate that a less onerous sanction than the one awarded by the ALJ would be appropriate: no supplier of Allred's demands that they be put out of business; closure of Allred's will have no deterrent effect in the industry; in excess of 30 people will lose their jobs; small to medium size businesses who depend on Allred's will fail because they will be required to buy produce from more costly sources; and, a 30 year old

business with an unblemished record will close its doors. In these circumstances, a civil penalty or probationary period of inspection and observance would be a more appropriate and rationale sanction. A less drastic sanction would enable Allred's to remain in business, pay its suppliers in the ordinary course of its business, and, at the same time, serve to promote the Secretary's overall policy by warning others of the Secretary's intent of seeking full compliance within the industry as a whole.

2. **THE LOWER COURT ERRED IN FAILING TO FIND THAT THE FINDINGS AND CONCLUSIONS OF THE FINAL ORDER, THAT THE FAILURES TO PAY ON THE PART OF ALLRED'S WERE REPEATED AND FLAGRANT, WERE ARBITRARY AND CAPRICIOUS.**

In his Bench Decision, Judge Hunt concluded that Allred's failed to make full payment promptly to 19 sellers for the agreed purchase prices of 86 lots of perishable agricultural commodities in the total amount of $336,153.40. Judge Hunt also concluded that Allred's failures to pay its suppliers amounted to repeated and flagrant violations of the PACA. These conclusions, adopted in the final order, are in error, and are arbitrary and capricious.

The PACA does not define "repeated and flagrant." The record reflects that, at the time of the Hearing, Allred's had paid over 50% of the past due accounts which were the subject of the Secretary's Complaint. Further, Allred's was in the process of paying all outstanding accounts according to terms acceptable to suppliers - i.e., either extended terms or, if beyond ordinary terms, through agreements reached between the parties. No suppliers were complaining about mistreatment or past due payments. Many suppliers were continuing to supply Allred's even though Allred's owed them money.

Under these circumstances, it cannot be said that the failures to pay certain accounts with suppliers were intentional, repeated, or flagrant. Further, all suppliers were being paid "promptly" within the context agreed upon between the parties. In this regard, Mr. White,

an expert, testified at trial that buyers and sellers frequently allow for terms which exceed those previously agreed upon or which may be reflected on invoices.

Given the foregoing, it was arbitrary and capricious for the ALJ and the Judicial Officer to conclude that the unintentional actions on the part of Allred's constituted "flagrant and repeated" violations of the PACA justifying the imposition of sanctions.

3. **THE LOWER COURT ERRED IN FAILING TO FIND THAT THE FAILURE TO CONCLUDE THAT ALLRED'S WAS, ESSENTIALLY, SINGLED OUT FOR ENFORCEMENT ACTION WAS ARBITRARY AND CAPRICIOUS.**

Allred's was singled out for selective enforcement under the PACA's disciplinary provisions. This is evidenced in the manner and method by which disciplinary proceedings are handled within the USDA.

In the present case, in determining whether and to what extent a disciplinary proceeding should be commenced, the Secretary acted on a complaint received by a disgruntled supplier, whose complaint may have been subsequently resolved. An audit ensued. The Secretary, unprompted by any supplier, continued its proceeding. The record further reflects that most complaints and disciplinary actions are maintained against small to mid-sized buyers, primarily because complaints are rarely maintained against institutional buyers because of their monetary clout in the industry. As such, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer.

4. **THE ALLOWANCE OF THE INTRODUCTION OF "NEW CLAIMS" AT THE AGENCY HEARING WAS IN EXCESS OF THE LOWER COURT'S AUTHORITY AND WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BY LAW.**

This action was commenced when the USDA filed a Complaint. Allred's filed a response to the Complaint and an amendment thereto. At no time was the Complaint ever amended.

At the June 18 Hearing, the Secretary introduced evidence of new claims. The new claims were based on a follow-up audit and analysis conducted less than one month prior to the hearing. No pleading was presented to Judge Hunt with respect to the new claims asserted against Allred's, and Allred' s had no idea of the new claims until the time of the hearing.

The Secretary argued that the "new claims" constituted "roll-over" indebtedness which provided evidence that Allred's was, essentially, "robbing Peter to pay Paul." By permitting the introduction of new allegations against Allred's, without first amending the Complaint, Allred's was forced to respond to allegations without due process of law and was substantially and irreparably injured in its ability to present evidence to Judge Hunt. Allred's was left without the ability to respond to the new allegations.

Allred's was entitled to and was denied due process of law under the United States Constitution in an administrative proceeding. Although he could have done so in a timely fashion, the Secretary chose not to amend the Complaint and not to observe the procedure required by law. As a result, Allred's was ambushed at the hearing without the ability to properly defend itself. *In re Carolina Biological Supply Company*, 53 Agric. Dec.96, 100 (1994) ("[C]omplainant seeks to add charges alleging new factual allegations never mentioned, nor alluded to, until the hearing. The tenor of the Administrative Procedure Act is to provide fair and just oral hearings... not those where one party can ambush another.")

Allred's first learned of the Secretary's intention to assert new claims when it received the Secretary's Motion for Bench Decision on or about June 17, 1997, one day prior to the June 18 Hearing. The Secretary unfairly and prejudicially obviated its own mandated procedures to its advantage. In essence, as noted in *Carolina Biological Supply*, the Secretary, without any showing of good cause,

"ignore[d] the entire prehearing process of claim identification and clarification instead announcing claims at the end of the hearing process. The fundamental elements of due process are notice and an opportunity to be heard." *Carolina Biological Supply*, 53 Agric. Dec. at 101 (citations omitted).

The introduction of the new claims at the hearing, without prior notice or compliance with applicable procedures, hindered Allred's ability to fully and adequately respond to the Secretary's contentions and enabled the Secretary to obtain an unfair advantage before Judge Hunt. As a result, Judge Hunt imposed sanctions against Allred's which, had such additional claims not be before him at the time, he might very well have chosen to have imposed, and such sanction was affirmed by the final order.

Further, Judge Hunt's findings that Mr. Allred's testimony at the hearing substantiate that Allred's was not engaged in the practice commonly referred to as "robbing Peter to pay Paul." In fact, Allred's efforts demonstrate an effort to improve the company's financial business structures to facilitate payment of, rather than robbing, its suppliers. These efforts have enabled Allred's to reduce the accounts payable to its suppliers, work within the terms imposed by the suppliers (which more accurately reflect market conditions and practices), and generate new business and income. In essence, Allred's has been and continues to pay old debt with new capital and income. In a robbery there is no intention that the victim will recover stolen merchandise or be repaid. In the present case, however, no supplier will be left unpaid - rather, all will be eventually paid.

Judge Hunt's obvious reliance on the "new claims" indicates that he was persuaded that Allred's was incurring new indebtedness at the expense of past suppliers. This clearly influenced his decision, adopted as the final order, that the conduct on the part of Allred's was both repeated and flagrant, thereby justifying the sanction of revocation. However, no evidence supports this conclusion and, as noted above, nothing could be further from the truth. This was clear error, and the admission of the testimony at issue was in excess of the

Court's authority and without observance of procedure as required by law.

5. **THE REVOCATION OF ALLRED'S LICENSE WAS WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BY LAW BECAUSE THERE WAS NO EVIDENCE THAT THE SECRETARY'S INVESTIGATION OF ALLRED'S, WHICH RESULTED IN THE FILING OF THE COMPLAINT, WAS BASED ON RECEIPT BY THE SECRETARY OF WRITTEN NOTIFICATION OF A VIOLATION OF THE PACA.**

The PACA provides that an investigation may not be conducted unless the Secretary first has received written notification of a complaint or violation of the PACA from someone other than an employee of the Secretary. 7 U.S.C. § 499f(b). This is a necessary statutory precondition to the Secretary's commencement of an official investigation and complaint for license revocation.

In the present case, the Secretary offered and there is no evidence that any written notification of a violation or complaint had been received by the Secretary which justified the Secretary's compliance investigation of Allred's in February of 1996, which was the basis for the filing of the Complaint. A follow-up audit took place in May, 1997, just prior to the Hearing.

Because there is no evidence of any written notification of a violation or complaint pending at the time the Secretary commenced the February, 1996 investigation, which served as the basis for the filing of the Complaint, the Secretary failed to prove an essential element of his authority to seek license revocation. As such, Judge Hunt erred in revoking Allred's license, and the revocation was without observance of procedure as required by law.

6. **THE ALLOWANCE AND CONSIDERATION OF THE TESTIMONY OF THE SECRETARY'S REPRESENTATIVE, WHICH WAS ENTIRELY UNSUPPORTED, UNDOCUMENTED, UNSUBSTANTIATED, AND UNRELIABLE, WAS WITHOUT OBSERVANCE OF PROCEDURE AS REQUIRED BY LAW.**

At the Hearing, Joan Colson, the Secretary's representative, testified as to the policy of the Secretary and the appropriateness of the sanction of revocation.

Ms. Colson testified that the sanction of revocation was appropriate because Allred's had not made full payment of all outstanding accounts at the time of the Hearing. However, although she knew what sanction the Secretary was seeking, she was not able to identify the basis for the Secretary's position or policy.

For example, Ms. Colson testified that, although she did not personally review the financial books and records of Allred's, Allred's had, in her analysis, failed to achieve "sufficient capitalization" which would have enabled Allred's to "deal with those financial difficulties in a way that doesn't involve borrowing money from produce creditors" - i.e., "robbing Peter to pay Paul." However, upon questioning by Judge Hunt, Ms. Colson could not identify any guidelines or other basis for assessing the amount of capitalization Allred's "should have to cover all possible contingencies."

Further, Ms. Colson testified that the Secretary had conducted no analysis or survey of the effectiveness of the policy. Therefore, there is absolutely no way to determine if the purpose for the policy, i.e., deterrence of violations and adherence to the prompt pay provision, is being achieved and whether imposition of the policy in this case was appropriate.

Further, although she articulated a number of factors considered by the Secretary in determining whether to seek license revocation, Ms. Colson could not identify the source of these factors. Upon examination, Ms. Colson testified that the presence of two

factors - substantial amount of money and unpaid purchases not paid at *the time of the Hearing* - *alone* would justify revocation, "without exception" - i.e., no consideration of mitigating factors. As noted above, this testimony is a complete misstatement of the current state of the law and the Secretary's policy with respect to imposition of sanctions.

To the extent Judge Hunt relied on Ms. Colson's testimony at the Hearing, this reliance was inappropriate, misplaced, and without observance of procedure as required by law.

CONCLUSION

Based on the foregoing, Allred's requests that the final order be set aside and that the sanction of license revocation be reversed.

Respectfully submitted,

James C. Gordon
Counsel of Record
BOSWELL & KOBER, P.C.
500 Throckmorton Street
1800 Bank One Tower
Fort Worth, Texas 76102
Telephone: (817) 878-4300
Facsimile : (817) 878-4343

(Any footnotes trail end of each decision)
No. 98-60187

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALLRED'S PRODUCE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

July 1, 1999, Decided

COUNSEL:
For ALLRED'S PRODUCE, Petitioner: Mark William Romney, Boswell & Kober, Dallas, TX. Kelly Elizabeth DeBerry Boswell & Kober, Fort Worth, TX.

For UNITED STATES DEPARTMENT OF ARGICULTURE, Respondent: Stephen Michael Reilly, Washington, DC.

JUDGES:
Before POLITZ, HIGGINBOTHAM, and DAVIS, Circuit Judges.

OPINIONBY:
W. EUGENE DAVIS

OPINION:

W. EUGENE DAVIS, Circuit Judge:

Petitioner Allred's Produce ("Allred's") appeals a final order of the Secretary of Agriculture revoking its license under the Perishable Agricultural Commodities Act ("PACA"), *7 U.S.C. § §*

499a-499s, for willful, repeated, and flagrant failure to make full payment promptly to various sellers of perishable agricultural commodities. Allred's contends that the Secretary's findings and sanction were arbitrary and capricious, that Allred's was singled out for selective enforcement, and that the Secretary failed to observe various procedural requirements under the PACA. For reasons that follow, the Secretary's order is affirmed.

I.

Before proceeding to the specific facts and issues of this case, it is useful to review the applicable statutory and regulatory framework. Congress enacted the PACA in 1930 "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables." *George Steinberg and Son, Inc. v. Butz, 491 F.2d 988 (2nd Cir. 1974).* It was designed "to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Zwick v. Freeman, 373 F.2d 110, 116 (2nd Cir. 1967).* To that end, the PACA establishes a strict licensing system with often severe sanctions for violations of its requirements.

Under the PACA, every dealer of perishable agricultural commodities is required to be licensed by the Secretary of Agriculture. *7 U.S.C. § 499c*(a). These dealers are subject to a number of statutory requirements, the most basic of which is that they make "full payment promptly" for all purchases of perishable agricultural commodities. *7 U.S.C. § 499b*(4). The Secretary has defined "full payment promptly" to mean "payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5). Parties may agree to a different time limit, provided that they reduce such an agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. 7 C.F.R. § 46.2(aa)(11). The party claiming the existence of such an agreement has the burden of proof. Id.

The PACA authorizes stiff penalties for violation of the prompt payment requirement. Upon determining that any dealer has violated any of the PACA's statutory requirements, the Secretary may publish the facts and circumstances of the violation and suspend the license of the offender for up to 90 days. *7 U.S.C. § 499h*(a). Moreover, if the violation is flagrant or repeated, the Secretary may revoke the license of the offender. Id. Alternatively, under the 1995 amendments to the PACA, the Secretary may impose a civil penalty not to exceed $ 2,000 per violation or $ 2,000 each day a violation continues. *7 U.S.C. § 499h*(e).

II.

Allred's is a partnership formed in 1966, composed of Raymond M. Allred and his son, Ronald D. Allred. Its sole business is the purchase and sale of produce. Allred's has been licensed under the PACA continuously, without suspension or revocation, since 1977. The PACA Branch of the United States Department of Agriculture ("PACA Branch") conducted three investigations of Allred's between 1994 and 1997. The first investigation was in 1994, and resulted in no formal complaint against Allred's. The second investigation, a compliance review, was in February 1996. It revealed that, during the period from May 1993 through February 1996, Allred's failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the total amount of $ 336,153.40. Based on these findings, PACA Branch initiated a complaint against Allred's in July 1996. The third investigation, an audit to ascertain whether Allred's had brought its operation into compliance with the PACA prior to hearing, was in May 1997. The audit revealed that $ 149,329.66 of the original $ 336,153.40 remained unpaid. The audit further found that the firm's total interstate and foreign commerce past due debt had risen to $ 463,328.61, owed to 25 sellers for 125 lots of perishable agricultural commodities.

A hearing was conducted before an Administrative Law Judge ("ALJ") in June 1997. Additional testimony was taken during a telephone hearing in August 1997. The ALJ issued his decision

from the bench at the close of the hearing. He found that Allred's Produce had failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the amount of $ 336,153.40 during the period from May 1993 through February 1996. He further found that these violations were willful, repeated, and flagrant. Based on these findings, the ALJ revoked the firm's PACA license.

Allred's filed an administrative appeal of the ALJ's decision and order in September 1997. The Judicial Officer ("JO"), acting for the Secretary, issued a final decision and order in December 1997 adopting the ALJ's decision and adding several more conclusions. Allred's sought reconsideration, which the JO denied in February 1998. The JO did, however, stay his order pending the outcome of judicial review. This appeal followed.

III.

Judicial review of the decision of an administrative agency is narrow. *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971).* The decision will be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . ." *5 U.S.C. § 706*(2)(A). An appellate court may not substitute its own judgment for that of the Secretary. *American Fruit Purveyors, Inc. v. United States, 630 F.2d 370, 373 (5th Cir. 1980).* The Secretary's **[**6]** decision may only be overturned if it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86, 36 L. Ed. 2d 142, 93 S. Ct. 1455 (1973).* Likewise, judicial review of a sanction imposed under the PACA is extremely limited. *Wayne Cusimano, Inc. v. Block, 692 F.2d 1025, 1030 (5th Cir. 1982).* "The choice of sanctions imposed by the Secretary of Agriculture, through his Judicial Officer, may not be overturned in the absence of a patent abuse of discretion." *American Fruit Purveyors, 630 F.2d at 374.*

Allred's challenges the Secretary's final order on the following six grounds: (1) the sanction awarded was arbitrary and capricious; (2)

the findings and conclusions of the Secretary were arbitrary and capricious; (3) Allred's was singled out for selective enforcement; (4) the allowance of the introduction of new claims at the agency hearing was in excess of the agency's authority and without observance of procedure; (5) the revocation of Allred's license was without observance of procedure because the Secretary failed to establish that a written notice of a violation of the PACA had been received by the Secretary prior to commencement of PACA Branch's investigation; and (6) the allowance and consideration of certain questionable and unreliable evidence and testimony at the hearing was without observance of procedure. We find these arguments unpersuasive.

A.

Allred's first argues that the Secretary's decision to impose the sanction of license revocation was arbitrary and capricious under the attendant circumstances of the case and under the custom and practice of the industry. According to Allred's, no supplier of perishable agricultural commodities realistically expects to be paid according to terms, and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. Thus, Allred's states, the 10-day time limit established by the regulations is outdated and does not reflect the real world. Revocation of Allred's license would therefore have no deterrent effect on other buyers of perishable agricultural commodities. Allred's also describes as abusive the Secretary's failure to consider outside factors militating against the imposition of sanctions, such as Allred's efforts to pay its suppliers and the fact that no supplier of Allred's desired Allred's to be forced out of business, and the Secretary's failure to consider imposition of monetary penalties as an alternative sanction. Finally, Allred's contends that the Secretary abused his discretion by failing to consider whether the purpose behind the sanction--deterrence of violative conduct and reducing the risk of loss to suppliers--would be accomplished through license revocation.

These arguments are unavailing. As noted above, we will not overturn the Secretary's choice of sanction absent a patent abuse of discretion. *American Fruit Purveyors, 630 F.2d at 374.* Our only consideration, therefore, is "whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of remedy.'" *Glover Livestock, 411 U.S. at 189* (quoting *Jacob Siegel Co. v. FTC, 327 U.S. 608, 612, 90 L. Ed. 888, 66 S. Ct. 758 (1946)).* We find that the Secretary's judgment in this case was both warranted in law and justified in fact. Where a violation of the PACA is "flagrant or repeated," the PACA by its own terms authorizes revocation of the violator's license. *7 U.S.C. § 499h*(a). Here, the Secretary found that Allred's violations of the PACA were both flagrant and repeated. For reasons discussed below, we agree. Thus, the revocation of Allred's license was well within the Secretary's authority. We will not embark on a legislative analysis of the PACA's relevance to modern industry practice, nor will we reexamine the aggravating and mitigating evidence to determine whether we would have arrived at some lesser sanction. Those are not appropriate functions for an appellate court sitting in review of a final administrative order. It is enough that the sanction imposed by the Secretary was allowable under the PACA and the facts of this case.

B.

Allred's next challenges as arbitrary and capricious the Secretary's finding that its failures to pay were willful, repeated, and flagrant. Allred's points out that, at the time of the hearing, it had paid over 50 percent of the past due accounts that were the subject of the Secretary's complaint, and was in the process of paying all outstanding accounts under terms acceptable to its suppliers. According to Allred's, no suppliers were complaining about mistreatment or past due payments, and many suppliers were continuing to supply Allred's even though Allred's owed them money. Under these circumstances, Allred's contends, it cannot be said that the failures to pay were willful, repeated, or flagrant. We disagree. Under the regulations, "full payment promptly" means payment within 10 days of the date on which the produce is

accepted, or payment within the time specified in writing by prior agreement of the parties. 7 C.F.R. § 46.2(aa). Allred's does not deny that it failed on numerous occasions to make full payment promptly under this definition. Nor does Allred's dispute that, during a nearly three-year period from May 1993 through February 1996, it failed to make full payment promptly on 86 lots of perishable agricultural commodities in the total amount of $ 336,153.40. In light of these undisputed facts, we can find no error, and certainly no abuse of discretion, in the Secretary's finding that the violations were willful, repeated, and flagrant.

Violations are "repeated" under the PACA if they are not done simultaneously. *Reese Sales Company v. Hardin, 458 F.2d 183, 187 (9th Cir. 1972); Zwick v. Freeman, 373 F.2d 110, 115 (2nd Cir. 1967).* Here, the 86 violations were spread out over a period of two years and ten months. Violations are "willful" under the PACA "if the prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory authority." *Finer Foods Sales Co., Inc. v. Block, 228 U.S. App. D.C. 205, 708 F.2d 774, 778 (D.C. Cir. 1983).* Similarly, whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. See *Reese, 458 F.2d at 187; Zwick, 373 F.2d at 115.* Here, Allred's violated the PACA 86 times over nearly three years for an amount totaling over $ 300,000. To describe these violations as anything other than "willful" and "flagrant" would be to render those terms meaningless. The Second Circuit expressed this point best in Zwick: "It is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of [the PACA]. It would be hard to imagine clearer examples of 'flagrant' violations of the statute than were exemplified by petitioners' conduct." *Zwick, 373 F.2d at 115.*

C.

Allred's argues next that it was singled out for selective enforcement under the PACA's disciplinary provisions. Allred's asserts that most complaints and disciplinary actions under the PACA are maintained against small to mid-sized buyers rather than institutional buyers. Thus, Allred's asserts, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer.

This argument fails on its face. Even taking all of Allred's allegations as true, we can find no legal rationale for vacating the Secretary's order. "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962).* Rather, it must be shown that the selective enforcement "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. Allred's cites no authority, and we can find none, for the proposition that an otherwise culpable PACA violator is shielded from the consequences of his actions simply because the PACA is applied unevenly to non-institutional buyers. We agree with the Secretary that "[the] PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings."

D.

Allred's concludes with three challenges to the procedural validity of the ALJ's hearing. Each of these challenges lacks merit. First, Allred's contends that the ALJ impermissibly allowed the introduction of "new claims" at the hearing. The "new claims" to which Allred's refers are the new violations uncovered by PACA Branch in its May 1997 audit of Allred's. Allred's argues that the admission of these new claims at the hearing without amendment of the complaint forced Allred's to respond to allegations without due process of law and substantially and irreparably injured its ability to present evidence to respond to the new claims.

We disagree. The final order of the Secretary makes clear that Allred's was sanctioned solely for the 86 violations alleged in the

Secretary's original complaint, not for the additional violations uncovered in the May 1997 audit. The "new claims" evidence was actually nothing more than evidence of the current indebtedness of Allred's, which was relevant to the question of relief from license revocation. Under Department of Agriculture policy, a dealer who otherwise faces license revocation may escape that sanction if it can show "(i) that it has made full payment of the transactions alleged in the Complaint, and (ii) [that] such payment was not made by 'robbing Peter to pay Paul." *In re John J. Conforti, 54 Agric. Dec. 693, 700 (1995)* (citing *In re Edgar Lamar Holcomb, 48 Agric. Dec. 602, 629-42 (1989)).* The May 1997 audit revealed that Allred's did not qualify for such a mitigation of sanction, and the so-called "new claims" evidence was admitted solely on that issue. Thus, the ALJ did not improperly admit evidence of new claims. Rather, he properly considered relevant evidence that Allred's did not qualify for relief from license revocation on the existing claims. The sanction itself was based solely on the 86 violations alleged in the original complaint.

Second, Allred's argues that the revocation of its license was without observance of procedure as required by law because there was no evidence that the Secretary's investigation of Allred's was based on receipt by the Secretary of written notification of a violation of the PACA. Allred's notes that *7 U.S.C. § 499f*(b) requires such written notification prior to commencement of an official investigation, and asserts that the Secretary failed to present evidence of such notification to justify the February 1996 compliance review that resulted in the complaint against Allred's. This argument lacks basis both in law and in fact. The written notification requirement was added as part of the 1995 amendments to the PACA, more than a year after the initial investigation of Allred's began in 1994. The Secretary found, based on substantial record evidence, that the 1996 compliance review was a follow-up to the original 1994 investigation. We agree. As such, since the investigation began prior to the enactment of the written notification requirement, the requirement could not act as a bar to the Secretary's actions in this case. Moreover, the 1994 investigation was triggered by trust notices

and a reparation complaint filed against Allred's. Thus, even if the written notification requirement did apply, these written complaints were sufficient to satisfy it.

Finally, Allred's challenges the ALJ's decision to admit the testimony of Joan Colson, the Secretary's representative, to make a sanction recommendation. Allred's contends that her testimony was entirely unsupported, undocumented, unsubstantiated, and unreliable, and that the admission of it was therefore without observance of procedure as required by law. Once again, we disagree. We note first that there is no reference to Ms. Colson's testimony in the ALJ's order, and that there is no evidence that either the ALJ or the Secretary relied on her testimony in imposing the sanction of license revocation. Additionally, we agree with the Secretary that Ms. Colson was a reliable witness with respect to the sanction recommendation, and that the sanction recommended and imposed was in accordance with the PACA. In sum, we find that the ALJ and the Secretary likely did not rely on Ms. Colson's testimony in imposing the sanction of license revocation, but even if they did, that reliance was not erroneous, because the recommendation was consistent with the PACA and the regulations.

IV.

We find that the Secretary's decision to revoke Allred's PACA license was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore, the Secretary's Decision and Order is affirmed.

AFFIRMED.

In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Decision and Order filed December 5, 1997.
PERISHABLE AGRICULTURAL COMMODITIES ACT

Jane McCavitt, for Complainant.
Respondent pro se.

Initial Decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.
The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 29, 1996.

The Complaint alleges that, during the period May 1993 through February 1996, Allred's Produce [hereinafter Respondent] violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $336,153.40 for 86 lots of perishable agricultural commodities, which Respondent received and accepted in interstate commerce (Compl. ¶ III). Respondent filed Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Answer] on September 30, 1996, in which Respondent denies violating the PACA, but asserts that $187,404.76 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on September 30, 1996 (Answer ¶ 5). Respondent filed Amended Response of Allred's Produce to the Complaint of the Secretary of

Agriculture [hereinafter Amended Answer] on April 17, 1997, in which Respondent denies violating the PACA, but asserts that less than $148,984.07 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on April 16, 1997 (Amended Answer ¶ 5).

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing begun on June 18, 1997, in Dallas, Texas, and continued and completed on August 8, 1997, in Washington, D.C. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Bruce W. Akerly, Esq., Bell & Nunnally, PLLC, Dallas, Texas, represented Respondent.[1] The ALJ issued a bench decision on August 8, 1997, in which the ALJ concluded that Respondent violated section 2 of the PACA (7 U.S.C. § 499b) and revoked Respondent's PACA license (Tr. 286). On August 20, 1997, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for errors of spelling, punctuation, and transcription [hereinafter Initial Decision and Order].

On September 5, 1997, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35). [FN2] On October 1, 1997, Complainant filed Complainant's Response to Respondent's Appeal, and on October 23, 1997, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's
Conclusion of Law.

Complainant's exhibits are designated by the letters CX, Respondent's exhibits are designated by the letters RX, and transcript references are designated by Tr.

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7--AGRICULTURE

. . . .

CHAPTER 20A--PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in

respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7--AGRICULTURE

. . . .

SUBTITLE B--REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I--AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B--MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46--REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, the Act, or in the trade shall be construed as follows:

. . . .

(aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. Full payment promptly, for the purpose of determining violations of the Act, means:

. . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute full payment promptly: Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . .

Statement of the Case

Respondent, Allred's Produce, is a partnership composed of Raymond M. Allred and Ronald D. Allred [(Answer ¶ 3; Tr. 8, 67, 122). Respondent's] business addresses are 1901 Fir Avenue, McAllen, Texas 78504, and 17115 State Highway, 64 East, Tyler, Texas 75707-8729 [(Answer ¶ 3)]. Respondent is a licensed produce dealer which received PACA license number 771066 on April 5, 1977 [(Answer ¶ 4)].

A PACA compliance review of Respondent's operation in 1996 revealed that, during the period May 1993 through February 1996, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of $336,153.40, which [Respondent] had purchased, received, and accepted in interstate . . . commerce [(CX 2-21; Tr. 13-26)].

Another compliance review conducted in May 1997 revealed that, during the period May 1993 through May 1997, Respondent failed to make full payment promptly to 25 sellers of the agreed purchase prices for 125 lots of perishable agricultural commodities in the total amount of $463,328.61, which Respondent had purchased, received, and accepted in interstate and foreign commerce [(CX 22-25; Tr. 26-36)]. Of this debt, $[1]49,329.66 continued from the prior investigation, while $313,998.95 was new debt [(CX 24-25)]. Of the $336,153.40 of Respondent's indebtedness, which was the subject of the Complaint, $186,823. [7]4 was paid by Respondent by May 1997, with $149,329.66 remaining unpaid at the time of the hearing [(CX 24-25; Tr. 28-29)].

The Complaint alleges that these failures to make full payment promptly of the agreed purchase prices for the 86 lots of perishable agricultural commodities that Respondent . . . received and accepted [in interstate commerce] constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA [(Compl. ¶ V)].

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, inter alia, for any commission merchant, dealer, or broker to fail to make full payment promptly of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Full payment promptly is defined by the regulations in 7 C.F.R. § 46.2(aa)(5) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

The Complaint alleges that Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with respect to the 86 transactions involving perishable agricultural commodities in interstate commerce for a total of $336,153.40.

Th[ese] failure[s] of Respondent to make [full] . . . payments [promptly] for its produce purchases constitute violation[s] of section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]). The fact that [Respondent] paid part of this indebtedness by the time of the hearing does not alter the fact of the violation[s]. Despite the payment, Respondent continues to owe its [produce] creditors substantial sums of money. Respondent's failures to pay promptly and in full for 86 transactions involving substantial sums of money over a period of almost 3 years also constitute [willful,] repeated, and flagrant violations.

Sanction

As sanction for these violations, Complainant seeks revocation of Respondent's [PACA] license. The Department's policy is firm and well- established that, where [a] respondent is not in compliance at the time of the hearing, the appropriate sanction is license revocation.

Respondent argues that its problems stem largely from customers being unable to pay Respondent the money they owe [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c)). Respondent] states that in 1992 its accounts

payable were over one million dollars and that it has managed to pay down a substantial amount of that sum and that it expects to continue to make inroads into the amount it owes, if allowed to remain in business as a viable company [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c))].

Respondent, therefore, contends that if it loses its PACA license it will be unable to pay its creditors the money to which they are entitled [(Respondent's Opposition to Complainant's Motion for Bench Decision ¶ 4(c)). Respondent] requests that these circumstances be considered and that discretion be exercised in the imposition of a sanction. However, [collateral effects of a PACA license revocation are relevant, neither to a determination whether a respondent made full payment promptly, as required, nor to the sanction to be imposed for willfully, flagrantly, and repeatedly failing to make full payment promptly.]

Respondent presented evidence that [the definition of the term full payment promptly in 7 C.F.R. § 46.2(aa)(5) providing for payment for produce within 10 days after the day on which the produce is accepted] is outdated and does not reflect the real world [(Tr. 187-88, 198-200). However, until the definition is amended, Respondent is bound by it, and even if I found that the 10-day requirement in 7 C.F.R. § 46.2(aa)(5) is outdated and does not reflect the real world, as Respondent contends, that finding would not excuse Respondent's failure to comply with the provisions of the regulation. Moreover, the definition of full payment promptly specifically provides that parties may agree to times for payment for produce other than the times provided in 7 C.F.R. § 46.2(aa)(1)-(10) (7 C.F.R. § 46.2(aa)(11)).]

As for Respondent's argument that it was singled out for selective enforcement, [nothing in the record supports Respondent's contention that it was the target of selective enforcement]. Accordingly, . . . since Respondent failed to make full payment promptly for 86 lots of perishable agricultural commodities totalling over $300,000, the penalty is an Order revoking

Respondent's [PACA] license.

Findings of Fact

1. Respondent, Allred's Produce, is a partnership composed of Raymond M. Allred and Ronald D. Allred [(Answer ¶ 3; Tr. 8, 67, 122)].
2. Respondent is a produce dealer [(Answer ¶ 4)].
3. At all times material [to this proceeding] Respondent, Allred's Produce, was licensed under the provisions of the PACA [(Answer ¶ 4)].
4. During the period May 1993 through February 1996, Respondent, Allred's Produce, failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of $336,153.40, which Respondent, Allred's Produce, had purchased, received, and accepted in interstate . . . commerce [(CX 2-21; Tr. 13-26)].

Conclusion of Law

Respondent [has committed willful, flagrant, and repeated violations of] section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[3] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.[4] Complainant has proved its case by much more than a preponderance of the evidence, which is all that is required.

Respondent raises seven issues in Respondent's Appeal Petition. First, Respondent contends that revocation of its PACA license for failure to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) is irrational, inappropriate,

arbitrary, and capricious because:

> In the industry, no supplier realistically expects to be paid accordingly to terms (whether they be those imposed under the regulations or otherwise) and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. (August 18 Tr. at 197-198). What is important is the business relationship between the buyer and the seller. (Id. at 198). And, in the context of the industry, the prompt pay provision of the PACA, as currently enforced by the Secretary, doesn't reflect the real world and what actually goes on. . . . (Id.).

Respondent's Appeal Petition at 9.

Even if I agreed with Respondent's contention that the prompt pay requirement of the PACA does not reflect the real world and what actually goes on, I would not find that revocation of Respondent's PACA license for failure to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) and section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) is irrational, inappropriate, arbitrary, and capricious.

The Regulations clearly provide that full payment promptly for the purpose of determining violations of the PACA means payment for produce purchased by a buyer within 10 days after the day on which the produce is accepted (7 C.F.R. § 46.2(aa)(5)). Moreover, the Regulations provide that parties who elect to use times of payment that are different than those set out in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) may do so by agreement as provided in section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)).

The evidence clearly establishes that Respondent failed to pay 19 sellers for 86 lots of perishable agricultural commodities within 10 days after the day on which Respondent accepted the produce. Further, there is no evidence that Respondent and these produce

sellers entered into a written agreement to use a different time of payment. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and even if I found, as Respondent contends, that no supplier expects to be paid in accordance with the Regulations and that the definition of the term full payment promptly in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) doesn't reflect the real world and what goes on, those findings would not constitute a basis for concluding that the sanction imposed on Respondent in this proceeding is irrational, inappropriate, arbitrary, and capricious.[5]

Respondent also contends that the sanction of revocation is irrational, inappropriate, arbitrary, and capricious because it would not achieve any deterrent effect in the industry. (Respondent's Appeal Petition at 10.) Respondent cites, as support for its position, Mr. Byron Edward White, former regional director of the Southwest Region, PACA Branch, Fruit and Vegetable Division, AMS, USDA (Tr. 184), who testified regarding the deterrent effect of sanctions under the PACA as follows:

> [BY MR. AKERLY:]
>
> Q.With respect to whether or not the industry practice has been affected by the Secretary's promotion of this policy of going after prompt pay cases, and if there is [sic] no payments as of the time of the hearing, that revocation is a necessary sanction, that that particular policy and enforcement has not had any impact on the custom and practice in the industry?
>
> [BY MR. WHITE:]
>
> a. I don't know of a single occurrence of a party paying within 10 days just because another firm was sanctioned by the USDA.
>
> Q.Suppose Judge Hunt in this case were to adopt the Secretary's recommendation of revocation, in your opinion

would that have any real impact on the industry practices in McAllen or Tyler?

a. As to Tyler, as it pertains to the prompt payment provision, I don't think it never [sic] had an effect at all. It certainly would have an effect as far as the current sellers, the current people that sold to them and not paid. They certainly wouldn't benefit from it.

Q.And do you have an opinion as to whether or not the adopting of the Secretary's recommendation would have any impact on customers and all other businesses that are served in those communities?

a. Certainly. There is always an impact. You have an impact on people it employed, the services. Evidently I understand that they have two locations; one in Tyler and one in McAllen, and they have long-established customers that look to them for service, and this would be another seller to them that would be put out of business. The competition would be reduced, and it would be theoretical as to the economic impact that it would create in those two markets where this party is located.

Q.In your opinion, would any -- would any buyers in those geographic regions or even beyond be prompted as a result of adoption of the Secretary's recommendation to make sure that they are paid all of their accounts within 10 days or within the term agreements?

In other words, would sanctioning Allred in this case according to the way the Secretary would want, would that cause other buyers of produce in the McAllen and Tyler area to pay their suppliers more promptly?

a. No, I think you could monitor those firms that you are speaking of, I don't think you would notice any change in

the way they do business.

Tr. 207-09.

However, Ms. Joan Marie Colson, auditor with the Trade Practices Section, PACA Branch, Fruit and Vegetable Division, AMS, USDA, whose duties include making sanction recommendations (Tr. 157-58), testified regarding the deterrent effect of sanctions and the role of regional personnel, such as Mr. White, regarding sanction recommendations and sanction policies as follows:

[BY MS. McCAVITT]

Q.Is the industry also unique because of the Secretary's role?

[BY MS. COLSON:]

a. Well, the Secretary's role is to enforce the PACA. He does this even- handedly so a level playing field exists for everyone. The Secretary issues licenses to all fruit and vegetable traders. When he issues a license, he's making a statement that he has no reason to believe that these firms can't or won't abide by the laws or the Act that Congress has imposed on the industry.

The Secretary investigates firms that he thinks may have violated the Act, and he prosecutes those firms where violations are found. It serves as a deterrent -- you know, when you prosecute, it serves as a deterrent effect to the industry as well.

Q.So what effect do you believe the sanction will have on the industry?

. . . .

THE WITNESS: There are two effects basically. In this particular case it prevents Allred Produce and their

responsibly connected individuals from continuing to violate the law because they're still in business. A revocation would stop them from continuing violations. Second of all, the deterrent effect that I spoke of before is one of the largest effects for the sanction.

. . . .

Q.Okay. Ms. Colson, to your knowledge, do regional office personnel ever assist the chief regarding sanction recommendations?

a. No.

Q.And to your knowledge, do regional supervisors ever assist the chief regarding the PACA branch's sanction policies?

a. No.

Q.You heard Mr. White testify that this sanction would have no deterrent effect on the industry.
Do you agree?

a. No.

. . . .

JUDGE HUNT: Did you hear Mr. White's testimony that the Department's policy on license revocation does not serve as a deterrent or effectuate the interest of the industry in his opinion?

THE WITNESS: Right.

JUDGE HUNT: Did Mr. White present any arguments that you believe your supervisors, Ms. Servais or Mr. Frazier should consider in whether this policy continues to

-- should remain in effect?

THE WITNESS: No.

JUDGE HUNT: So you don't want any time to take up the matter with them?

THE WITNESS: No, sir.

Tr. 168-69, 240, 277-78.

As an initial matter, I give much more weight to Ms. Colson's testimony regarding the deterrent effect of sanctions than I give to Mr. White's testimony on the same subject because one of Ms. Colson's duties, which she has performed for 7 years, is to assist with sanction recommendations to the chief of the PACA Branch, Fruit and Vegetable Division, AMS, USDA (Tr. 157-58). On the other hand, while Mr. White has had 30 years' experience with USDA, 10 years of which was in a PACA Branch regional office, and over 2 years' experience as a consultant to produce marketers (Tr. 183-85), Mr. White's duties have never included making sanction recommendations or formulating sanction policies (Tr. 219, 240). Moreover, Mr. White contradicted his own testimony that the Secretary's policy has no deterrent effect as follows:

[BY MR. AKERLY:]

Q.Now, you also reviewed Ms. Colson's testimony concerning deterrence.

[BY MR. WHITE:]

a. Yes, I --

Q.Specifically, on page 158 of the transcript Ms. Colson states that the Secretary['s] investigations and prosecutions of firms where violations are found they are a deterrent

effect to the industry.

Do you have an opinion as to whether or not the Secretary's policy promotes a deterrent effect in the industry?

a. That plays in the background certainly. There is no question about it. . . .

Tr. 200.

Therefore, I do not find that the record supports Respondent's contention that the sanction of revocation would not achieve any deterrent effect in the industry. (Respondent's Appeal Petition at 10.) Instead, I find that the record supports a finding that the sanction of PACA license revocation has the effect of deterring others in the industry from failing to make full payment promptly in accordance with the PACA.

The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing.[6] This sanction policy is harsh, but has consistently been upheld by the courts.[7] Therefore, even if I found that the sanction of license revocation would not deter others in the industry from failing to make full payment promptly, the deterrent effect on Respondent alone would be sufficient to find that revocation of Respondent's PACA license is reasonable and appropriate.

This sanction is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry.[8] Allowing Respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign

commerce or to serve a suspension, when Respondent has failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect those who sell perishable agricultural commodities to Respondent.

Respondent also contends that the sanction of revocation is irrational, inappropriate, arbitrary, and capricious because of the wholesale failure to consider outside factors (Respondent's Appeal Petition at 11). Respondent states that there was a failure to consider the fact that no supplier was complaining about Allred's failure to pay (Respondent's Appeal Petition at 10) and that if Respondent were allowed to remain[] in business[,] it could pay its creditors (Respondent's Appeal Petition at 11 n.7).

Often produce creditors support a respondent's efforts to avoid PACA license revocation and remain in business in hopes that they (the produce creditors) will be paid some or all of the money that they are owed for perishable agricultural commodities. However, allowing a PACA licensee that has flagrantly or repeatedly failed to make full payment promptly in accordance with the PACA to remain in business in hopes that the PACA licensee will pay its current produce creditors frequently exposes other produce sellers to the risk of nonpayment. Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry, as a whole, is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or

repeatedly fail to make full payment promptly.

Moreover, collateral effects of a respondent's PACA license revocation are relevant, neither to a determination whether a respondent made full payment promptly, as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment. [FN9] The adverse impact on Respondent's produce sellers of the revocation of Respondent's PACA license and the absence of complaints by Respondent's produce sellers about Respondent's failure to pay in accordance with the PACA, are not relevant to this proceeding. [10]

Respondent also contends that the record shows that a large number of produce suppliers are frequently in non-compliance with the 'prompt pay' provision of the PACA on a daily basis (Respondent's Appeal Petition at 11). The fact that others may violate the prompt payment requirement of the PACA or that violation of the prompt payment requirement is widespread is relevant, neither to a determination whether a respondent made full payment promptly, as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment. Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a de minimis amount, whether Respondent had paid all produce sellers by the opening of the hearing, and whether Respondent is in compliance with the PACA and the regulations under the PACA. The ALJ considered all relevant factors, and there is no basis for finding that the sanction of revocation of Respondent's PACA license is irrational, inappropriate, arbitrary, and capricious for failure to consider outside factors.

Second, Respondent contends that the ALJ [e]rred [i]n [f]ailing [t]o [c]onsider [m]itigating [c]ircumstances [i]n [i]mposing [s]anctions [o]n Allred's (Respondent's Appeal Petition at 12-16). Respondent lists mitigating circumstances as follows:

> [N]o supplier of Allred's demands that they be put out of business; closure of Allred's will have no deterrent effect

> in the industry; in excess of 30 people will lose their jobs; small to medium size business[es] who depend on Allred's will fail because they will be required to buy produce from more costly sources; and, a 30 year old business with an unblemished record will close its doors.

Respondent's Appeal Petition at 15.

With the exception of Respondent's alleged unblemished record, I do not find that any of the circumstances listed by Respondent on page 15 of Respondent's Appeal Petition are mitigating circumstances. Further, I have discussed my reasons for concluding that the failure of Respondent's produce creditors to demand revocation of Respondent's PACA license is irrelevant and my disagreement with Respondent's contention that revocation of its license will have no deterrent effect on the perishable agricultural commodity industry in this Decision and Order, supra, pp. 13-21. Moreover, I find that the effect of the revocation of Respondent's PACA license on employment of 30 persons and on small and medium-sized businesses, which rely on Respondent, to be collateral effects of license revocation, not mitigating circumstances. Collateral effects are not relevant to a determination whether a respondent made full payment promptly as required or to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.[11] This Department routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees.[12]

The only mitigating circumstance which Respondent cites as a basis for its contention that the ALJ erred by revoking Respondent's PACA license is Respondent's alleged unblemished record. However, mitigating circumstances, like collateral effects, are not relevant circumstances under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA.[13] Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a de minimis amount, whether Respondent had paid all sellers by the

opening of the hearing, and whether Respondent is in compliance with the PACA and the regulations under the PACA. Even if a respondent has been a commission merchant, dealer, or broker for an extended period of time and can demonstrate that the firm has never violated the PACA during that extended period of time, such circumstances are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful.
Moreover, such circumstances are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.[14]

Third, Respondent contends that the ALJ's conclusion that Respondent's failures to make full payment promptly were repeated and flagrant is in error (Respondent's Appeal Petition at 16-17).

I disagree with Respondent's contention. Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $336,153.40 for 86 lots of perishable agricultural commodities which Respondent received and accepted in interstate commerce. These failures took place over the period May 1993 through February 1996, a period of 2 years and 10 months.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are willful, repeated, and flagrant as a matter of law. Respondent's violations are repeated because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.[15]

Further, I find that Respondent's violations of the payment provisions are willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[16] Willfulness is reflected by Respondent's violation of express requirements of the

PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa))[17] and in the length of time during which the violations occurred and the number and amount of violative transactions involved. Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 2-year and 10-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not, pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.[18]]

Fourth, Respondent contends that the ALJ erred by failing to conclude that Respondent was singled out for selective enforcement under the PACA's disciplinary provisions. (Respondent's Appeal Petition at 17.) Specifically, Respondent contends that it was singled out for enforcement based on its size as follows:

> The record further reflects that most complaints and disciplinary actions are maintained against small to mid-sized buyers, primarily because complaints are rarely maintained against institutional buyers - because of their monetary clout in the industry. As such, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer. (August 8 Tr. 195-197).

Respondent's Appeal Petition at 17.

As an initial matter, an examination of the record in this proceeding reveals no evidence that supports Respondent's contention that it was singled out for selective enforcement of the

PACA. Moreover, an examination of Agriculture Decisions reveals that a great number of disciplinary proceedings for violations of the PACA have been instituted by the Administrator of AMS or delegates of the Administrator against firms of various sizes.

However, even if Respondent could show that it was singled out for a disciplinary action under the PACA, such selection would be lawful so long as the administrative determination to selectively enforce the PACA was not arbitrary.[19] Respondent has no right to have the PACA go unenforced against it, even if it is the first firm against whom the PACA is enforced and even if Respondent can demonstrate that it is not as culpable as some others that have not had disciplinary proceedings instituted against them. PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings for violations of the PACA.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.[20]

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.[21] Respondent bears the burden of proving that it is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[22] In order to prove its selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be

prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[23]

Respondent has not shown that it is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) it exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.[24] Respondent has not shown any of these circumstances.

Fifth, Respondent contends that the ALJ erred by allowing the introduction at the hearing of evidence of new claims against Respondent for failure to make full payment promptly. Respondent asserts that it was denied due process because the Complaint was never amended to include these new claims and that the ALJ erred when he relied on these new claims when determining the sanction to be imposed against Respondent (Respondent's Appeal Petition at 18- 20).

This argument is rejected because the ALJ properly allowed and considered outstanding indebtedness at the time of the hearing. A respondent demanding that complainant amend the complaint before being allowed to show a respondent's current indebtedness at the hearing is a routine occurrence in these types of cases. On the surface, the argument seems logical, but it misses the whole point of the prompt payment requirement, which calls for payment, not promises. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment requirement of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk. In a case in which an administrative law judge took the position advanced in this

proceeding by Respondent, the Judicial Officer took the opportunity to set forth the Department's policy on this issue:

> The ALJ's views set forth above are based on a failure to apply the Department's policy stated, inter alia, in In re The Caito Produce Co., 48 Agric. Dec. 602, 629-42 (1989). In Caito, it is explained that a revocation order is warranted where a Respondent fails to pay promptly, over an extended period of time, for produce transactions involving a substantial amount of money. It is further explained, however, that if the Respondent demonstrates by the time of the hearing, or if no hearing is held, by the time Respondent files its Answer, (i) that it has made full payment of the transactions alleged in the Complaint, and (ii) such payment was not made by robbing Peter to pay Paul, the sanction will be mitigated. Caito further states that, not only must Respondent be in present compliance with the payment provisions at the time of the hearing, or at the time the Answer is filed if there is no hearing, but, also, Respondent cannot even have agreements with creditors for payment to be made beyond 30 days. Finally, Caito makes it clear that if Complainant demonstrates that Respondent is merely rolling over its debt, by robbing Peter to pay Paul, the sanction to be issued is for the violations alleged in the Complaint--not for the more current transactions in which Complainant shows that Respondent is merely rolling over its debt. Since the sanction is being imposed only for the transactions alleged in the Complaint, there is no need for Complainant to amend the Complaint in order to refute Respondent's allegation that the sanction for the Complaint-transactions should be mitigated because of later compliance.

The compliance review conducted in May 1997 revealed that, during the period May 1993 through May 1997, Respondent failed to make full payment promptly to 25 sellers for the agreed purchase prices of 125 lots of perishable agricultural commodities in the total amount of $463,328.61, which Respondent had

purchased, received, and accepted in interstate and foreign commerce (CX 22-25; Tr. 26-36). The May 1997 investigation reveals that, as of May 1997, Respondent had not paid $149,329.66 of the $336,153.40 which Respondent is alleged in the Complaint to have failed to pay fully and promptly to sellers of perishable agricultural commodities. The remaining $313,998.95 revealed during the May 1997 audit was new debt which Respondent owed to produce sellers (CX 24-25; Tr. 28-29).

Respondent's bookkeeper, Ms. Beverly Heffner, conducted her own audit of Respondent's books and testified that, as of June 17, 1997, Respondent had not paid $130,131.47 of the $336,153.40 which Respondent is alleged in the Complaint to have failed to pay fully and promptly to sellers of perishable agricultural commodities and that Respondent owed a total of $447,384.71 to sellers of perishable agricultural commodities (RX 7-8; Tr. 90-91, 94-95, 116).

In order to avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent had not only failed to pay all produce sellers by the date of the hearing, but also had not paid all of the debts alleged in the Complaint to be owed to produce sellers.

Sixth, Respondent contends that the ALJ erred by revoking Respondent's PACA license because there is no evidence that the investigation which resulted in the Complaint in this proceeding was based on receipt by the Secretary of written notification of a violation of the PACA (Respondent's Appeal Petition at 21).

Respondent raises the issue of the Secretary's receipt of a written notification for the first time in Respondent's Appeal Petition. It is well settled that new issues cannot be raised for the first time on appeal to the Judicial Officer.[25] Respondent's failure to raise the issue of receipt by the Secretary of a written notification until it filed Respondent's Appeal Petition is too late.

However, even if Respondent's argument was timely, it would still fail. The Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 [hereinafter PACAA-1995], was approved on November 15, 1995. Prior to the approval of the PACAA-1995, written notification of an alleged violation of the PACA was not required to precede an investigation of a violation of the PACA by the Secretary. Section 7 of the PACAA-1995 amends section 6(b) and (c) of the PACA to require that either a reparations complaint must be made or a written notification must be filed prior to the initiation of an investigation of a violation of the PACA by the Secretary as follows:

> § 499f. Complaints, written notifications, and investigations
>
> . . . .
>
> (b) Disciplinary violations
>
> Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of an agency of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section 499e of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section 552 of title 5 (commonly known as the Freedom of Information Act), as

provided in subsection (b)(3) of such section.

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation
If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process
In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

(3) Special notification requirements for certain investigations
Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify

> the subject of the investigation of the evidence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(b), (c) (Supp. I 1995).

The record reveals that an initial investigation of Respondent's failure to make full payment promptly in accordance with the PACA occurred in 1994 and that the February 1996 investigation, which resulted in the Complaint filed in this proceeding, was a follow-up to the initial 1994 investigation. Mr. Jeffrey Spradlin, the USDA, AMS, PACA Branch employee, who conducted the February 1996 and May 1997 investigations of Respondent, testified as to the connection between the 1994 investigation and the February 1996 investigation of Respondent as follows:

> BY MS. McCAVITT:
>
> Q.Mr. Spradlin, do you think that -- You talked about you didn't know the reason why you went in for the investigation in February of 1996, but you did mention in your direct testimony that there was a previous investigation; is that true?
>
> [BY MR. SPRADLIN:]

a. Yes, there was.

Q.Do you think that might have been what was prompting the second --

a. Yes. Probably it was --

. . . .

Q.I'm just trying to ask if you believe that there might -- part of the reason that you were sent in to do the investigation in February of '96 was because there had been an introductory investigation --

. . . .

a. Yes, that more than likely was a factor in conducting the February '96 investigation, as a follow-up.

Tr. 52-54.

Further, Mr. White testified as to the circumstances regarding the 1994 investigation as follows:

[BY MS. McCAVITT:]

Q.So you have become familiar recently with Allred's Produce; is that correct?

[BY MR. WHITE:]

a. I knew of the existence of Allred's Produce prior to my retirement.

Q.Did you assign an investigator to investigate the firm?

a. Let's see. In restoration [sic] matters, yes.

Q.Do you recall that you assigned an investigator to investigate the firm in a disciplinary matter in 1994?

Well, to do an audit; it wasn't necessarily going to be a disciplinary matter.

a. Yes, there was an audit.

Q.Do you recall what prompted the investigation?

a. I'm pretty sure it was the number of trust notices that were filed against them, and perhaps there was one large reparation complaint that was filed against them that was, I think, somewhere in the neighborhood of $300,000 on some tomatoes that were flown in from Mexico that all that produce was involved in. That's kind of a mixed up mess to put it in the various flat turns [sic]. Allred's did not deny that they owed the money but it was a very convoluted circumstance.

Q.Okay. So that prompted the investigation?

a. That was one of the things, yes.

Q.Okay. And do you recall what was the result of that investigation?

a. That there were repeated instances of slow pay.

Q.Okay. And since then, as you know from getting familiar with the facts of this case, there has been two more audits done of the firm; is that correct? You know that?

a. I think there was an audit at one of the locations. . . .

Tr. 220-22.

Respondent's bookkeeper, Ms. Heffner, testified regarding her recollection of the nature of the 1994 investigation as follows:

[BY MR. AKERLY:]

Q.Do you remember the -- Were you present during the 1994 USDA audit that Mr. Spradlin mentioned earlier?

[BY MS. HEFFNER:]

a. Yes.

Q.Do you recall Mr. Dutton coming out for that audit?

a. Yes, I do.

Q.Do you recall receiving any disciplinary complaint or any kind of action taken as a result of that audit?

a. It has been a long time, but the only thing I recall is a letter stating that we were outside of compliance or were not complying. But there was no disciplinary action of any kind.

Q.You're not aware of any action taken as a result of that audit?

a. No.

Q.And between 1994 and 1996, you're not aware of any other audit that took place?

a. 1994 and '96? No.

Tr. 102.

Further, a letter sent by J.D. Flanagan, Chief, PACA Branch, to Respondent and served on Ms. Heffner on February 12, 1996, prior to the February 1996 investigation, advises Respondent that the PACA Branch is conducting a follow- up to the 1994 investigation as follows:

> R.M. Allred
> Allred's Produce
> 17115 State Highway 64E
> Tyler, Texas 75707
>
> Dear Mr. Allred:
>
> This is to advise you that we are conducting a follow-up investigation involving allegations that your firm has committed violations of the Perishable Agricultural Commodities Act (PACA). An investigation in June 1994, documented that your firm failed to make full payment promptly, a violation of Section 2(4) of the Act. Allred's Produce is required to allow access, examination and photocopying of its business record by Jeffrey Spradlin, a Marketing Specialist with USDA, AMS, PACA Branch. This request includes, but is not limited to, financial statements, accounts receivable, accounts payable, purchases and related documentation, bank records, and any other business documents pertinent to the completion of this investigation.
>
> . . . .
> Sincerely,
> J. D. Flanagan, Chief
> P.A.C.A. Branch
> Fruit and Vegetable Division

Complainant's Response to Respondent's Appeal, Exhibit A.

I find, based on the record, that the February 1996 investigation was a follow-up investigation to the 1994 investigation of Respondent which was conducted before the PACAA-1995 was

approved. As the investigation of Respondent was begun prior to the approval of the PACAA-1995, which amended the PACA to require that investigations by the Secretary be preceded by a complaint made in accordance with section 6(a) of the PACA (7 U.S.C. § 499f(a)) or a written notification filed in accordance with section 6(b) of the PACA (7 U.S.C. § 499f(b)), I find that written notification of a violation of the PACA was not required to precede the investigation in this proceeding.

Seventh, Respondent contends that the ALJ erred by relying on the testimony of Ms. Colson regarding the sanction recommended by agency officials against Respondent (Respondent's Appeal Petition at 22-23).

This case is governed by the sanction policy adopted by the Secretary of Agriculture in In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), aff'd, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. In re S.S. Farms Linn County, Inc., supra, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to impose in the event that it is found that a violation occurred.[26] The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less than that recommended by administrative officials. [FN27] Witnesses for parties in these proceedings frequently testify regarding the appropriate sanction to be imposed, and in this proceeding, Respondent, as well as Complainant, introduced testimony regarding the appropriate sanction.

Further, the record reveals that Ms. Colson was a reliable witness with respect to the sanction recommendation. Ms. Colson testified that she had been an auditor with the Trade Practices Section, PACA Branch, AMS, USDA, for 7 years and that during that time her duties included recommending to the chief of the PACA Branch the sanction to be sought for violations of the PACA and testifying at hearings, such as the hearing conducted in this proceeding, as to sanction recommendations of the chief of the PACA Branch.

Moreover, I do not find any reference in the ALJ's Initial Decision and Order to Ms. Colson's testimony, and it is not clear to what extent, if any, the ALJ relied on Ms. Colson's testimony. Nevertheless, even if I found that the ALJ relied extensively on Ms. Colson's sanction testimony, I would not find such reliance on her testimony to constitute error. Further, I agree with the sanction recommended by the agency officials and imposed by the ALJ and find that the revocation of Respondent's PACA license under the circumstances in this proceeding is in accordance with the PACA and Department policy.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

Footnotes

[1] On November 12, 1997, Bruce W. Akerly, Esq., filed a Motion to Withdraw as Counsel for Petitioner [sic] which was granted (Ruling on Motion to Withdraw as Counsel, filed November 14, 1997).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

[3] Herman & MacLean v. Huddleston, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, at 92-104 (1981).

[4] In re Kanowitz Fruit & Produce Co., 56 Agric. Dec. 917, 927 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Havana Potatoes of New York Corp., 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Petition for Reconsideration); In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1247 n.2 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1269 (1995), aff'd, 104 F.3d 139 (8th Cir. 1997); In re John J. Conforti, 54 Agric. Dec. 649, 659 (1995), aff'd in part & rev'd in part, 74 F.3d 838 (8th Cir. 1996), cert. denied, 117 S.Ct. 49 (1996); In re DiCarlo Distributors, Inc., 53 Agric. Dec. 1680, 1704 (1994), appeal withdrawn, No. 94-4218 (2d Cir. June 21, 1995); In re Boss Fruit & Vegetable, Inc., 53 Agric. Dec. 761, 792 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); In re Full Sail Produce, Inc., 52 Agric. Dec. 608, 617 (1993); In re Lloyd Myers Co., 51 Agric. Dec. 747, 757 (1992), aff'd, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); In re

Tipco, Inc., 50 Agric. Dec. 871, 872-73 (1991), aff'd per curiam, 953 F.2d 639, 1992 WL 14586 (4th Cir.), printed in 51 Agric. Dec. 720 (1992), cert. denied, 506 U.S. 826 (1992); In re Sid Goodman & Co., 49 Agric. Dec. 1169, 1191-92 (1990), aff'd per curiam, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), printed in 50 Agric. Dec. 1839 (1991), cert. denied, 503 U.S. 970 (1992); In re Valencia Trading Co., 48 Agric. Dec. 1083, 1091 (1989), appeal dismissed, No. 90-70144 (9th Cir. May 30, 1990); In re McQueen Bros. Produce Co., 47 Agric. Dec. 1462, 1468 (1988), aff'd, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); In re Perfect Potato Packers, Inc., 45 Agric. Dec. 338, 352 (1986); In re Tri- County Wholesale Produce Co., 45 Agric. Dec. 286, 304 n.16 (1986), aff'd per curiam, 822 F.2d 162 (D.C. Cir. 1987), reprinted in 46 Agric. Dec. 1105 (1987).

[5] If Respondent believes that the definition of full payment promptly in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) should be amended to reflect the real world, Respondent should exercise its right under 5 U.S.C. § 553(e) to petition USDA, in accordance with 7 C.F.R. § 1.28, for amendment of the regulation, rather than repeatedly and flagrantly violating the prompt payment requirements of the PACA.

[6] See, e.g., In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); In re Boss Fruit & Vegetable, Inc., 53 Agric. Dec. 761, 788 (1994), appeal dismissed , No. 94- 70408 (9th Cir. Nov. 17, 1994); In re The Norinsberg Corp., 52 Agric. Dec. 1617, 1623 (1993), aff'd, 47 F.3d 1224 (D.C. Cir.), cert. denied, 116 S.Ct. 474 (1995); In re Roxy Produce Wholesalers, Inc., 51 Agric. Dec. 1435, 1441 (1992); In re Lloyd Myers Co., 51 Agric. Dec. 747, 765 (1992), aff'd, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); In re The Caito Produce Co., 48 Agric. Dec. 602, 629-42 (1989); In re McQueen Bros Produce Co., 47 Agric. Dec. 1462, 1467 (1988), aff'd, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); In re Carpenito Bros. Inc., 46 Agric. Dec. 486, 506 (1987), aff'd, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir.

1988); In re Clarence Miller Co., 43 Agric. Dec. 529, 532 (1984); In re Gilardi Truck & Transp., Inc., 43 Agric. Dec. 118, 123, 149-50 (1984).

[7] In re Joe Phillips & Associates, Inc., 48 Agric. Dec. 583 (1989), aff'd, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), printed in 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); In re Melvin Beene Produce Co., 41 Agric. Dec. 2422 (1982), aff'd, 728 F.2d 347 (6th Cir. 1984); In re Finer Foods Sales Co., 41 Agric. Dec. 1154 (1982), aff'd, 708 F.2d 774 (D.C. Cir. 1983); In re C.B. Foods, Inc., 40 Agric. Dec. 961 (1981), aff'd mem., 681 F.2d 804 (3d Cir.), cert. denied, 459 U.S. 831 (1982); In re Sam Leo Catanzaro, 35 Agric. Dec. 26 (1976), aff'd, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977); In re Maine Potato Growers, Inc., 34 Agric. Dec. 773 (1975), aff'd, 540 F.2d 518 (1st Cir. 1976); In re J. Acevedo & Sons, 34 Agric. Dec. 120, aff'd per curiam, 524 F.2d 977 (5th Cir. 1975); In re George Steinberg & Son, Inc., 32 Agric. Dec. 236 (1973), aff'd, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974).

[8] Tri-County Wholesale Produce Co. v. United States Dep't of Agric., 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam); Marvin Tragash Co. v. United States Dep't of Agric., 524 F.2d 1255, 1257 (5th Cir. 1975); Chidsey v. Guerin, 443 F.2d 584, 588-89 (6th Cir. 1971); Zwick v. Freeman, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967); In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 917, 940-41 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1274 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1216 (1996), appeal docketed, Nos. 96- 3558 & 96-4238 (7th Cir. Dec. 30, 1996); In re Boss Fruit & Vegetable, Inc., 53 Agric. Dec. 761, 785 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); In re Full Sail Produce, Inc., 52 Agric. Dec. 608, 621 (1993); In re Roxy Produce Wholesalers, Inc., 51 Agric. Dec. 1435, 1440 (1992); In re Melvin Beene Produce Co., 41 Agric. Dec. 2422, 2425 (1982), aff'd, 728 F.2d

347 (6th Cir. 1984); In re Finer Foods Sales Co., 41 Agric. Dec. 1154, 1168 (1982), aff'd, 708 F.2d 774 (D.C. Cir. 1983); In re V.P.C., Inc., 41 Agric. Dec. 734, 741-42 (1982); In re Connecticut Celery Co., 40 Agric. Dec. 1131, 1133 (1981); In re Mel's Produce, Inc., 40 Agric. Dec. 792, 793 (1981); In re United Fruit & Vegetable Co., 40 Agric. Dec. 396, 402 (1981), aff'd, 668 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); In re Columbus Fruit Co., 40 Agric. Dec. 109, 112 (1981), aff'd mem., 673 F.2d 551 (D.C. Cir. 1982), printed in 41 Agric. Dec. 89 (1982); In re Sam Leo Catanzaro, 35 Agric. Dec. 26, 33 (1976), aff'd, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977). See also Harry Klein Produce Corp. v. United States Dep't of Agric., 831 F.2d 403, 405 (2d Cir. 1987) (stating that the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

[9] In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 917, 941 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1282-83 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1225-28 (1996), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996).

[10] In re Hogan Distributing Co., 55 Agric. Dec. 622, 639 (1996) (stating that the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); In re Samuel S. Napolitano Produce, Inc., 52 Agric. Dec. 1607, 1610 (1993) (stating that adverse impact of revocation of respondent's PACA license on respondent's creditors is not relevant); In re James D. Milligan & Co., 49 Agric. Dec. 573, 576 (1990) (stating that a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if respondent were permitted to remain in business); In re John A. Pirrello Co., 48 Agric. Dec. 565, 571 (1989) (stating that collateral effects on creditors of

PACA license revocation are not relevant); In re Charles Crook Wholesale Produce & Grocery Co., 48 Agric. Dec. 557, 564 (1989) (stating that detriment to creditors if respondent's PACA license is revoked is not relevant); In re Anthony Tammaro, Inc., 46 Agric. Dec. 173, 177 (1987) (stating that the fact that a respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant); In re Walter Gailey & Sons, Inc., 45 Agric. Dec. 729, 732 (1986) (stating that the fact that respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant).

[11] See note 9.

[12] In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 917, 941 (1997) (holding that the fact that a respondent's 25 employees will suffer harm from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Charles Crook Wholesale Produce & Grocery Co., 48 Agric. Dec. 557, 564 (1989) (stating that hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); In re Harry Klein Produce Corp., 46 Agric. Dec. 134, 171 (1987) (stating that the Department routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), aff'd, 831 F.2d 403 (2d Cir. 1987).

[13] Section 8(e) of the PACA (7 U.S.C. § 499h(e)) which provides alternative civil penalties for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. However, the factors that must be considered under section 8(e) of the PACA (7 U.S.C. § 499h(e)) are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license. In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1279 n.8

(1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 1204, 1225 n.13 (1996), appeal docketed, Nos. 96- 3558 & 96-4238 (7th Cir. Dec. 30, 1996).

[14] In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1279 (1996) (stating that an industry-wide crisis that has resulted in few purchasers paying for perishable agricultural commodities within 10 days, respondents' excellent payment history relative to others in the perishable commodities industry, and respondents' good faith efforts to address their payment problems are not relevant circumstances under the Department's sanction policy), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 1204, 1225 (1996) (stating that previous compliance with the PACA, good faith efforts to pay produce suppliers, and excuses for failure to pay are not relevant to the sanction to be imposed), appeal docketed, Nos. 96- 3558 & 96-4238 (7th Cir. Dec. 30, 1996); In re Magic City Produce Co., 44 Agric. Dec. 1241, 1245-46 (1985), aff'd mem., 796 F.2d 1477 (11th Cir. 1986) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by $200,000 in losses in 2-year period from theft of produce from respondent's warehouse are not relevant circumstances).

[15] See, e.g., Farley & Calfee v. United States Dep't of Agric., 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); Melvin Beene Produce Co. v. Agricultural Marketing Service, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 violations of the payment provisions of the PACA occurring over a 14-month period to be repeated and flagrant violations of the PACA); Wayne Cusimano, Inc. v. Block, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the

PACA); Reese Sales Co. v. Hardin, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2 1/2 months to be repeated and flagrant); Zwick v. Freeman, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the PACA payment provisions did not occur simultaneously, they must be considered repeated; and finding that the 295 violations are flagrant violations of the PACA because they occurred over several months and involved more than $250,000), cert. denied, 389 U.S. 835 (1967); In re Tolar Farms, 56 Agric. Dec. ___, slip op. at 16-17 (Nov. 6, 1997) (holding that respondents' failure to pay 7 sellers $192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers $206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers $238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 55 Agric. Dec. 1204 (1996) (concluding that Respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers $245,873.41

for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); In re James Metcalf, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); In re Harry T. Silverfarb, 1 Agric. Dec. 637 (1942) (concluding that the failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); In re Sol Junsberg, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

[16] See, e.g., Toney v. Glickman, 101 F.3d 1236, 1241 (8th Cir. 1996); Cox v. USDA, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); Finer Foods Sales Co. v. Block, 708 F.2d 774, 777-78 (D.C. Cir. 1983); American Fruit Purveyors, Inc. v. United States, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); Eastern Produce Co. v. Benson, 278 F.2d 606, 609 (3d Cir. 1960); In re Tolar Farms, 56 Agric. Dec. ___, slip op. at 18 (Nov. 6, 1997); In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 917, 925 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 895-96 (1997); In re Havana Potatoes of New York Corp., 55 Agric. Dec. 1234, 1244 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); In re Andershock Fruitland, Inc., 55 Agric. Dec. 1204, 1232-33 (1996), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); In re Hogan Distrib., Inc., 55 Agric. Dec. 622, 626 (1996); In re Moreno Bros., 54 Agric. Dec. 1425, 1432 (1995); In re Granoff's Wholesale Fruit & Produce, Inc., 54 Agric. Dec. 1375, 1378 (1995); In re Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1330 (1995), aff'd, 104 F.3d 139 (8th Cir. 1997); In re National Produce Co., 53 Agric. Dec. 1622, 1625 (1994); In

re Samuel S. Napolitano Produce, Inc., 52 Agric. Dec. 1607, 1612 (1993). See also Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 n.5 (1973) ('Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.); United States v. Illinois Central R.R., 303 U.S. 239, 242-43 (1938) (In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.') The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word willfulness, as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. Capital Produce Co. v. United States, 930 F.2d 1077, 1079 (4th Cir. 1991); Hutto Stockyard, Inc. v. USDA, 903 F.2d 299, 304 (4th Cir. 1990); Capitol Packing Co. v. United States, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

[17] See Finer Foods Sales Co. v. Block, 708 F.2d 774, 781-82 (D.C. Cir. 1983); In re Tolar Farms, 56 Agric. Dec. ___, slip op. at 18-19 (Nov. 6, 1997); In re Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 895 (1997); In re Hogan Distrib., Inc., 55 Agric. Dec. 622, 629 (1996); In re Granoff's Wholesale Fruit & Produce, Inc., 54 Agric. Dec. 1375, 1378 (1995); In re National Produce Co., 53 Agric. Dec. 1622, 1625 (1994); In re Samuel S. Napolitano Produce, Inc., 52 Agric. Dec. 1607, 1612 (1993); In re The Caito Produce Co., 48 Agric. Dec. 602, 643-53 (1989).

[18] See In re Tolar Farms, 56 Agric. Dec. ___, slip op. at 19-20 (Nov. 6, 1997); In re Hogan Distrib., Inc., 55 Agric. Dec. 622, 630 (1996); In re The Norinsberg Corp., 52 Agric. Dec. 1617, 1622 (1993), aff'd, 47 F.3d 1224 (D.C. Cir.), cert. denied, 116 S. Ct. 474 (1995); In re Kornblum & Co., 52 Agric. Dec. 1571, 1573-74

(1993); In re Full Sail Produce, Inc., 52 Agric. Dec. 608, 622 (1993); In re Vic Bernacchi & Sons, Inc., 51 Agric. Dec. 1425, 1429 (1992); In re Atlantic Produce Co., 35 Agric. Dec. 1631, 1641 (1976), aff'd per curiam, 568 F.2d 772 (4th Cir.) (Table), cert. denied, 439 U.S. 819 (1978).

[19] FTC v. Universal-Rundle Corp., 387 U.S. 244, 251-52 (1967); Moog Industries, Inc. v. FTC, 355 U.S. 411, 413-14 (1958) (per curiam).

[20] Futernick v. Sumpter Township, 78 F.3d 1051, 1056 (6th Cir.), cert. denied, 117 S. Ct. 296 (1996)

[21] Oyler v. Boles, 368 U.S. 448, 456 (1962); Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[22] United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982).

[23] See Futernick v. Sumpter Township, 78 F.3d 1051, 1056 n.7 (6th Cir.), cert. denied, 117 S. Ct. 296 (1996)

[24] Id.

[25] In re David M. Zimmerman, 56 Agric. Dec. 433, 473-74 (1997); In re Barry Glick, 55 Agric. Dec. 275, 282 (1996); In re Jeremy Byrd, 55 Agric. Dec. 443, 448 (1996); In re Bama Tomato Co., 54 Agric. Dec. 1334, 1342 (1995), aff'd, 112 F.3d 1542 (11th Cir. 1997); In re Stimson Lumber Co., 54 Agric. Dec. 155, 166 n.5 (1995); In re Johnny E. Lewis, 53 Agric. Dec. 1327, 1354-55 (1994), aff'd in part, rev'd & remanded in part, 73 F.3d 312 (11th Cir. 1996), decision on remand, 55 Agric. Dec. 246 (1996), aff'd per curiam sub nom. Morrison v. Secretary of Agric., No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); In re Craig Lesser, 52 Agric. Dec. 155, 167 (1993), aff'd, 34 F.3d 1301 (7th Cir. 1994); In re Rudolph J. Luscher, 51 Agric. Dec. 1026, 1026 (1992); In re Lloyd Myers Co., 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), aff'd, 15 F.3d 1086 (9th Cir. 1994),

1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 53 Agric. Dec. 686 (1994); In re Van Buren County Fruit Exchange, Inc., 51 Agric. Dec. 733, 740 (1992); In re Conesus Milk Producers, 48 Agric. Dec. 871, 880 (1989); In re James W. Hickey, 47 Agric. Dec. 840, 851 (1988), aff'd, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 48 Agric. Dec. 107 (1989); In re Dean Daul, 45 Agric. Dec. 556, 565 (1986); In re E. Digby Palmer, 44 Agric. Dec. 248, 253 (1985); In re Evans Potato Co., 42 Agric. Dec. 408, 409- 10 (1983); In re Richard Dick Robinson, 42 Agric. Dec. 7 (1983), aff'd, 718 F.2d 336 (10th Cir. 1983); In re Daniel M. Winger, 38 Agric. Dec. 182, 187 (1979), appeal dismissed, No. 79-C-126 (W.D. Wis. June 1979); In re Lamers Dairy, Inc., 36 Agric. Dec. 265, 289 (1977), aff'd sub nom. Lamers Dairy, Inc. v. Bergland, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), printed in 36 Agric. Dec. 1642, aff'd, 607 F.2d 1007 (7th Cir. 1979), cert. denied, 444 U.S. 1077 (1980).

[26] In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); In re R.H. Produce, Inc., 43 Agric. Dec. 511, 527-29 (1984); In re Larry W. Peterman, 42 Agric. Dec. 1848, 1850 (1983), aff'd, 770 F.2d 888 (10th Cir. 1985); In re Foursome Brokerage, Inc., 42 Agric. Dec. 1930, 1944 (1983), aff'd per curiam, 747 F.2d 1463 (5th Cir. 1984) (unpublished); In re William E. Hatcher, 41 Agric. Dec. 662, 669 n.3 (1982); In re Albert Lee Rowland, 40 Agric. Dec. 1934, 1950 n.9 (1981), aff'd, 713 F.2d 179 (6th Cir. 1983); In re Baltimore Tomato Co., 39 Agric. Dec. 412, 416 (1980); In re Samuel Esposito, 38 Agric. Dec. 613, 656-63 (1979); In re National Meat Packers, Inc., 38 Agric. Dec. 169, 177 n.6 (1978); In re Eric Loretz, 36 Agric. Dec. 1087, 1096 (1977); In re Overland Stockyards, Inc., 34 Agric. Dec. 1808, 1854-55 (1975); In re J.A. Speight, 33 Agric. Dec. 280, 310- 13 (1974); In re Professional Commodity Serv., 32 Agric. Dec. 585, 586-91 (remand order), second remand order, 32 Agric. Dec. 592 (1973), final decision, 33 Agric. Dec. 14 (1974); In re George Rex Andrews, 32 Agric. Dec. 553, 579 (1973); In re Sy B. Gaiber & Co., 31 Agric. Dec. 474,

505 n.20, reconsideration denied, 31 Agric. Dec. 843, 847-50 (1972); In re American Fruit Purveyors, Inc., 30 Agric. Dec. 1542, 1596 n.39 (1971).

[27] In re Kanowitz Fruit & Produce, Co., 56 Agric. Dec. 942, 953 (1997) (Order Denying Petition for Reconsideration); In re William E. Hatcher, 41 Agric. Dec. 662, 669 (1982); In re Sol Salins, Inc., 37 Agric. Dec. 1699, 1735 (1978); In re Braxton Worsley, 33 Agric. Dec. 1547, 1568 (1974).

In re: ALLRED'S PRODUCE
PACA Docket No. D-96-0531
Decision and Order filed August 20, 1997.

The following bench decision (corrected for errors of spelling, punctuation, and transcription) is excerpted from the record of the telephone hearing held August 8, 1997:

Decision and Order

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) referred to as the "PACA," the regulations promulgated pursuant to the PACA (7 C.F.R. § 46.1 through 46.45) and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 through 1.151).

The proceeding was instituted by a Complaint filed on July 29, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It alleges that Respondent, Allred's Produce, violated Section 2 of the PACA (7 U.S.C. § 499b(4)) by failure to make fill payment promptly of the agreed purchase prices for 86 lots of perishable agricultural commodities for a total of $336,153.40.

Respondent filed an Answer in which it denied violating the PACA. A hearing was held on June 18, 1997, in Dallas, Texas, and on August 8, 1997, in Washington, D.C. Complainant was represented by Jane McCavitt, Esq. Respondent was represented by Bruce W. Akerly, Esq.

Statement of the Case

Respondent, Allred's Produce, is a partnership composed of Raymond M. Allred and Ronald D. Allred. Its business addresses are 1901 Fir Avenue, McAllen, Texas 78504, and 17115 State Highway, 64 East, Tyler, Texas 75707-8729.

Respondent is a licensed produce dealer which received PACA license number 771066 on April 5, 1977.

A PACA compliance review of Respondent's operation in 1996 revealed that during the period May 1993 through February 1996 Respondent failed to make full payment promptly to 19 sellers for the agreed purchase prices of 86 lots of perishable agricultural commodities in the total amount of $336,153.40 which it had purchased, received, and accepted in interstate and foreign commerce.

Another compliance review, conducted in May 1997, revealed that during the period May 1993 through May 1997 Respondent failed to make full payment promptly to 25 sellers for the agreed purchase prices of 125 lots of perishable agricultural commodities in the total amount of $463,328.61, which Respondent had purchased, received, and accepted in interstate and foreign commerce. Of this debt, $449,329.66 continued from the prior investigation, while $313,998.95 was new debt. Of the $336,153.40 of Respondent's indebtedness which was the subject of the Complaint, $186,823.44 was paid by Respondent by May 1997, with $149,329.66 remaining unpaid at the time of the hearing.

The Complaint alleges that these failures to make full payment promptly of the agreed purchase prices for the 86 lots of perishable agricultural commodities that Respondent purchased, received, and accepted constitute wilful, flagrant, and repeated violations of Section 2 of the PACA.

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful inter alia for any commission merchant, dealer, or broker to fail to "make fbll payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Full payment promptly is defined by the regulations in 7 C.F.R. § 46.2(aa)(5) as requiring payment of the

agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

The Complaint alleges that Respondent violated the PACA and the regulations by failure to make full and prompt payment of the agreed purchase prices with respect to the 86 transactions involving perishable agricultural commodities in interstate commerce for a total of $336,153.40.

This failure of Respondent to make timely payments for its produce purchases constitutes a violation of Section 2 of the PACA (7 U.S.C. § 499b). The fact that it paid part of this indebtedness by the time of the hearing does not alter the fact of the violation. Despite the payment, Respondent continues to owe its creditors substantial sums of money. Respondent's failure to pay promptly and in full for 86 transactions involving substantial sums of money over a period of almost three years also constitute repeated and flagrant violations.

Sanction

As sanction for these violations, Complainant seeks revocation of Respondent's license. The Department's policy is firm and well-established that where the respondent is not in compliance at the time of the hearing the appropriate sanction is license revocation.

Respondent argues that its problems stem largely from customers being unable to pay Respondent the money they owe. It states that in 1992 its accounts payable were over one million dollars and that it has managed to pay down a substantial amount of that sum and that it expects to continue to make inroads into the amount it owes, if allowed to remain in business as a viable company.

Respondent, therefore, contends that if it loses its license it will be unable to pay its creditors the money to which they are entitled. It requests that these circumstances be considered and that discretion be exercised in the imposition of a sanction. However, I have no

discretion under the Department's policy. The policy is inflexible that when a respondent is not in compliance and a substantial sum remains unpaid at the time of the hearing, the only sanction is license revocation.

Respondent presented evidence that this policy is outdated and does not reflect the real world. Whether that policy should be changed is a matter that should be addressed to the Department's policy making level. Until changed, I am bound by the Department's policy.

As for Respondent's argument that it was singled out for selective enforcement, such action is permissible so long as it is not arbitrary. American Fruit Purveyors, 38 Agric. Dec. 1372 at 1385 (1979). I do not find that the action in this case was arbitrary. Accordingly, as required by Department policy, since Respondent failed to make full payment promptly for 86 lots of perishable agricultural commodities totalling over $300,000, the penalty is an Order revoking Respondent's license.

Findings of Fact

1. Respondent, Allred's Produce, is a partnership composed of Raymond M. Alired and Ronald D. Allred.

2. Respondent is a produce dealer.

3. At all times material herein Respondent, Allred's Produce, was licensed under the provisions of the PACA.

4. During the period May 1993 through February 1996 Respondent, Allred's Produce, failed to make full payment promptly to 19 sellers for the agreed purchase prices of 86 lots of perishable agricultural commodities in the total amount of $336,153.40 which Respondent, Allred's Produce, had purchased, received, and accepted in interstate and foreign commerce.

Conclusion of Law

Respondent violated Section 2 of the PACA (7 U.S.C. § 499b).

Order

The license of Respondent, Allred's Produce, is revoked. This Order shall take effect on the 11th day after this decision becomes final. Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after today, unless appealed to the Secretary by a party to this proceeding within 30 days as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).--Dated:August 8, 1997

Written copies of this excerpted bench decision and order are being provided to the parties in accordance with Section 1.142(c)(2) of the Rules of Practice (7 C.F.R. § 1.142(c)(2)).

August 20, 1997
Administrative Law Judge

7 U.S.C.

Sec. 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

- (1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.
- (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.
- (3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.
- (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section (c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of

the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

- (5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated -
    - (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or
    - (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant; and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.
- (6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in

container or railroad car or the State or country in which such commodity was produced.

- (7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

Sec. 499f. Complaints, written notifications, and investigations

- (a) Reparation complaints
  - (1) Petition; process
    Any person complaining of any violation of any provision of section of this title by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.
  - (2) Filing and handling fees
    A person submitting a petition to the Secretary under paragraph (1) shall include a filing fee of $60 per petition. If the Secretary determines under paragraph (1) that the facts contained in the petition warrant further action, the person or persons submitting the petition shall submit to the Secretary a handling fee of $300. The Secretary may not forward a copy of the complaint to the commission merchant, dealer, or broker involved until after the Secretary receives the required handling fee. The Secretary shall deposit fees submitted under this paragraph into the Perishable

until after the Secretary receives the required handling fee. The Secretary shall deposit fees submitted under this paragraph into the Perishable Agricultural Commodities Act Fund provided for by section (b) of this title. The Secretary may alter the fees specified in this paragraph by rulemaking under section 553 of title 5.

- (b) Disciplinary violations
  Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of an agency of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section of title 5 (commonly known as the Freedom of Information Act), as provided in subsection (b)(3) of such section.
- (c) Investigation of complaints and notifications
  - (1) Commencing or expanding an investigation
    If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary

Secretary may expand the investigation to include such additional violations.

- (2) Issuance of complaint by Secretary; process In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. However, in complaints wherein the amount claimed as damages does not exceed $30,000, a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact.
- (3) Special notification requirements for certain investigations Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the

or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

- (d) Decisions on complaints
  After opportunity for hearing on complaints where the damages claimed exceed the sum of $30,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $30,000 not requiring hearing as provided herein, the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section of this title.
- (e) Bond required for certain complaints
  In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: Provided, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

Sec. 499h. Grounds for suspension or revocation of license

- (a) Authority of Secretary
  Whenever (1) the Secretary determines, as provided in section of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having

flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section of this title, that a commission merchant, dealer, or broker has violated section of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.